84 folios

116

Supreme Ct. U.S.

SUPREME COURT OF THE UNITED STATES.

No. ~~202~~. 205. 111.

JOHN LEFFINGWELL, PLAINTIFF IN ERROR,

v.

GEORGE B. WARREN.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WISCONSIN.

G. S. GIDEON, Printer, No. 511 Ninth Street, Washington, D. C.

Rev'd with costs

Dec: 15. 1862.

SUPREME COURT OF THE UNITED STATES.

No. 292.

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v.

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District Court of the United States of America for the District of Wisconsin.

United States of America, District of Wisconsin, *ss.*

At a special term of the District Court of the United States of America for the District of Wisconsin, begun and held, according to law, at the city of Milwaukee, in said District of Wisconsin, on the second Monday (being the ninth day) of April, A.D. 1860.

Present, the Honorable Andrew G. Miller, judge of said court, presiding. Jehu H. Lewis, marshal. John M. Miller, clerk.

Among other the following proceedings were had, to wit:

GEORGE B. WARREN
v.
JOHN LEFFINGWELL. } Ejectment.

Be it remembered, that heretofore, to wit, on the fifth day of October, A.D. 1857, came the plaintiff, George B. Warren, by his attorneys, Messrs. Abbott and Clark, and filed his declaration in ejectment, with a notice for an appearance, on the first Monday of October instant, and an affidavit of authority to commence suit, and proof by affidavit of service thereof on the defendant, personally and by copy, on the 2d day of October, 1857, as follows:

District Court of the United States for the District of Wisconsin.

United States of America, District of Wisconsin, *ss.*

September 25th, A.D. 1857.

George B. Warren, a citizen of the State of New York, the plaintiff in this suit, by Abbott and Clark, his attorneys, complains of John Leffingwell, a citizen of the State of Wisconsin.

For that whereas the said plaintiff heretofore, to wit, on the first day of October, in the year of our Lord one thousand eight hundred and fifty-six, was possessed of the following-described pieces or parcels of land, situate in the county of Rock and State of Wisconsin, and known as the east half of the southwest quarter, and the southeast quarter of section thirty-four, in township No. one north, of range No. eleven east, of great value, to wit, of the value of three thousand dollars, which said premises the said plaintiff claims in fee; and he, the said plaintiff, being so possessed thereof, the said defen-

dant afterwards, to wit, on the tenth day of the same October, in the year of our Lord one thousand eight hundred and fifty-six aforesaid, entered into the said premises and ejected the said plaintiff therefrom, and now unjustly and unlawfully withhold from the said plaintiff the possession thereof, to the damage of the said plaintiff of five hundred dollars, and therefore he brings suit, &c.

ABBOTT & CLARK,
Plaintiff's Attorneys.

To the said defendant, John Leffingwell:

You are hereby notified that the declaration, with a copy whereof you are now herewith served, and to which copy this notice is subjoined, will be filed in the office of the clerk of said court, in the city of Milwaukee, on the first Monday of October. That upon filing the same, a rule will be entered requiring you to appear and plead to the said declaration within twenty days after the entry of such rule; and that if you neglect so to appear, a judgment by default will be entered against you, and the plaintiff will recover possession of the premises specified in the said declaration.

Dated this 24th day of September, 1857.

Yours, &c.,

ABBOTT & CLARK,
Plaintiff's Attorneys.

District of Wisconsin, *ss.*

Julius T. Clark, being duly sworn, deposes and says, that he is one of the law firm of Abbott & Clark, of Madison, in the State of Wisconsin, the attorneys for George B. Warren, the plaintiff named in the within declaration, and that they have written authority and directions from the agents of the said plaintiff to commence an action of ejectment for the premises within described, against the defendant named in said declaration, and further saith not.

J. T. CLARK.

Subscribed and sworn to before me, this 23d day of September, A.D. 18–7.

RUFUS S. RILEY,
Notary Public, Dane County, Wisconsin.

District of Wisconsin, *ss.*

Ezra Miller, being duly sworn, deposes and says, that he served the foregoing declaration, notice, and affidavit, on the within-named defendant, by showing the originals, and delivering true copies thereof to defendant at the same time, on the second day of October, A. D. 1857.

E. MILLER,
Deputy Marshal.

Subscribed and sworn to before me, this day of September, A.D. 1857.

JOHN M. CASE,
Notary Public.

And afterwards, to wit, at a term of said court, begun and held according to law, at the city of Milwaukee, on the first Monday of September, A.D. 1857, and on the twenty-second day of said term, to wit, on the sixth day of October, A.D. 1857, the following proceedings were had, to wit:

Rule to Plead.

GEORGE B. WARREN
v.
JOHN LEFFINGWELL. } At Law.

This day came the plaintiff, by his counsel, and on his motion, it is ordered by the court, that the defendant plead to the plaintiff's declaration on file, by the first Monday of November next, or his default will be entered.

And afterwards, to wit, on the twentieth day of October, A.D. 1857, came the defendant, by his attorneys, Messrs. Carpenter and Rockwell, and filed his plea, as follows:

Plea.

District Court of United States, District of Wisconsin.

GEORGE B. WARREN
v.
JOHN LEFFINGWELL. } Defendant's Pleas.

And the said defendant, John Leffingwell defendant, by Mat. H. Carpenter and William S. Rockwell, his attorneys, comes and defends the wrong and injury, &c., and says that he, said defendant, is not guilty of unlawfully withholding the premises claimed by the plaintiff, as alleged in the declaration; and of this he puts himself upon the country for trial, &c.

CARPENTER & ROCKWELL,
Attorneys for Defendant.

District of Wisconsin, State of Wisconsin, County of Rock, *ss.*

John Leffingwell, being duly sworn, on oath says, that he is the defendant above-named; that he has a good and valid and substantial defence to the entire claim and action of the said plaintiff, in the above-entitled action.

JOHN LEFFINGWELL.

Subscribed and sworn to before me, this 16th day of October, A.D. 1857.

MAT. H. CARPENTER,
Notary Public.

And afterwards, to wit, at a special term of the said court, begun and held according to law, at the city of Milwaukee, on the first Monday (being the sixth day) of September, A.D. 1858. Present the Honorable Andrew G. Miller, judge of said court, presiding. On the fifth day of said term, to wit, on the tenth day of September, A.D. 1858, the following proceedings were had, to wit:

GEORGE B. WARREN
v.
JOHN LEFFINGWELL. } At Law.

This day came the parties, by their counsel, and the issue herein joined came on to be tried, whereupon, a jury was called to try the same, who came, to wit: Augustus Greulich, H. A. Conger, J. H. Tracy, Alonzo Merrill, John Bauml, Ferdinand Kuehn, Rial Rolfe, Walter H. Moody, Charles T. Melms, Martin Olson, Robert A. Stewart, and John B. Hall, twelve free, honest, and lawful men of the district, who were severally sworn and impanelled, and charged by the court; and the said jurors of the jury retired to their room to deliberate on their verdict, under the charge of a sworn officer. And came the said jurors into court, and on their oaths, respectively, do say, that the defendant is guilty of unlawfully withholding the east half of the southwest quarter, and the southeast quarter of section thirty-four, in township No. one north, of range No. eleven east, in the county of Rock and State of Wisconsin, in manner and form as the said plaintiff hath herein declared against him; and the said plaintiff has established a title in fee therein, and is entitled to recover the possession of the same; and came the defendant, by his counsel, and moved the court for a new trial, as follows:

Motion for New Trial.

District Court of United States for the District of Wisconsin.
September Special Term, A.D. 1858.

GEORGE B. WARREN
v.
JOHN LEFFINGWELL. }

And now at this day, to wit, the 10th day of Sept. A.D. 1858, comes the defendant John Leffingwell, and by M. H. Carpenter and Wm. S. Rockwell, his attorneys, and moves the court for a new trial herein, upon the ground that the verdict is against law and evidence.

M. H. CARPENTER and
W. S. ROCKWELL,
Defendant's Attorneys.

Sept. 10th, 1858.

And afterwards, to wit, at a stated term of said court, to wit, begun and held, according to law, in the city of Milwaukee, in the district of Wisconsin, on the first Monday (being the third day) of January, A.D. 1859; present the Honorable Andrew G. Miller, judge of said court, presiding.

On the twenty-second day of said term, to wit, on the twelfth day of February, A.D. 1859, the following other proceedings were had, to wit:

GEORGE B. WARREN
v.
JOHN LEFFINGWELL. } At Law.

This day came the plaintiff by his counsel, and the motion of the defendant for a new trial being submitted; on consideration whereof it is ordered by the court, that the said motion be and hereby is overruled. And it is considered and adjudged by the court, that the plaintiff do have and recover possession of the premises, so as aforesaid described, and that he have a writ of possession for the same. And that the plaintiff do recover of the defendant John Leffingwell, thirty-five dollars and ninety-seven cents, his costs about his said suit in this behalf by him expended, and that he have execution therefor.

Judgment roll signed, February 12, 1859.

Costs, $35 97.

J. M. MILLER,
Clerk.

Judgment roll filed February 12th, A.D. 1859, at five o'clock P.M.

J. M. MILLER,
Clerk.

And afterwards, to wit, at a stated term of said court, begun and held according to law, at the city of Madison, on the first Monday of July, A.D. 1859; present the Honorable Andrew J. Miller, judge of said court, presiding. On the second day of said term, to wit, on the fifth day of July, A.D. 1859, the following proceedings were had, to wit:

GEORGE B. WARREN
v.
JOHN LEFFINGWELL. } At Law.

This day came the defendant by his counsel, and having paid the costs of the former trial, and on his motion it is ordered by the court, that the verdict and judgment be vacated, and a new trial be and hereby is ordered according to the statute.

And now, at this same term, to wit (April term, 1860), and on the twenty-third day thereof, to wit, on the seventh day of June, A.D. 1860, the following proceedings were had, to wit:

GEORGE B. WARREN
v.
JOHN LEFFINGWELL. } At Law.

This day came the parties by their counsel, and the issue herein came on to be tried. Whereupon a jury was called to try the same, who came, to wit: Peter Martineau, Albert Conro, Ormond T. Crane, Joseph R. Treat, John Eriston, Henry W. Allen, Nelson Webster, Frederick Heineman, Charles Rice, Francis Devlin, Jackson Hadley, and John White, twelve free, honest, and lawful men of the district, who were severally sworn and impanelled, and charged by the court.

And at the trial the following stipulation was filed by the parties:

Stipulation.

District Court of the United States for the District of Wisconsin.

GEORGE B. WARREN
v.
JOHN LEFFINGWELL.

To save expense of proof, the parties to this suit agree upon and stipulate to certain facts, to be admitted as proven and established on the trial of said cause, viz.:

1. That the plaintiff has a perfect chain of title to the land in question from the United States to himself, and that the defendant was in possession thereof at the time of the commencement of this suit, and that the land in suit is of the value of more than two thousand dollars.

2. That the county of Rock, on the 6th day of February, A.D. 1852, made and delivered to John M. Keep, a paper purporting to be a tax deed of said premises, of which, and the certificate of acknowledgment, the following is a copy, viz.:

State of Wisconsin, Rock County.

To all to whom these presents shall come, greeting:

Whereas, the treasurer of the county of Rock, in the then territory of Wisconsin, did on the eleventh day of April, in the year of our Lord one thousand eight hundred and forty-eight, in pursuance of law, sell to William A. Lawrence, treasurer of Rock county, the east half of the northwest quarter, and the west half of the northeast quarter of section twenty-two, town one, range twelve, containing one hundred and sixty acres; also, the west half of the southwest quarter of section eight, town one, range twelve, containing eighty acres; also, the southeast quarter of section twenty-eight, town one, range twelve, containing one hundred and sixty acres; also

the northwest quarter of the southwest quarter of section twenty-nine, town one, range eleven, containing forty acres; also, the southwest quarter of the southeast quarter of section twenty-one, town one, range eleven, containing forty acres; also, the west half of the southeast quarter of section thirty-four, town one, range eleven, containing eighty acres; also, the east half of the southwest quarter of section thirty-four, town one, range eleven, containing eighty acres; also, the east half of the southeast quarter of section thirty-four, town one, range eleven, containing eighty acres. Also, the following lots, in the village of Beloit, to wit: lot one, in block fifty-two; lot three, in block nineteen; lot twelve, in block four; lot three, in block forty-seven; for the sum of forty-one dollars and sixty-six and one-half cents, that being the amount of tax and charges due said county on the same, for the year 1847; and did issue certificates of the sale thereof to said purchaser. And whereas the time allowed by law for the redemption of said premises expired on the eleventh day of April, one thousand eight hundred and fifty-one.

And whereas said premises have not been redeemed within the time limited therefor by law; and in consequence thereof, the said purchaser, or his assigns, has become entitled to a deed for the same from the proper officer. And whereas it appears that John M. Keep is the lawful owner of said certificates.

Now, therefore, know all men by these presents, that the county of Rock, in consideration of the premises, and of the sum of forty-one dollars sixty-six and one-half cents, and in conformity with the laws of the State of Wisconsin, in such case made and provided, has granted, bargained, sold, and conveyed, and by these presents does grant, bargain, sell, and convey unto the said John M. Keep, his heirs and assigns, forever, all the above-mentioned and described premises.

Together with all and singular the privileges and appurtenances thereunto belonging. To have and to hold the same, with the privileges and appurtenances, to the said John M. Keep, his heirs and assigns, forever.

In testimony whereof, I, Chancy P. King, clerk of the board of supervisors of said county, have, in pursuance of law, hereunto set my hand and affixed my seal, at Janesville, in the county and State aforesaid, this sixth day of February, in the year of our Lord one thousand eight hundred and fifty-two.

[SEAL.] CHANCY P. KING,
Clerk of the Board of Supervisors.

In presence of
L. F. PATTEN,
J. W. HOBSEN.

State of Wisconsin, Rock County, *ss.*

On this sixth day of February, A.D. 1852, came before me the above-named Chancy P. King, clerk of the board of supervisors of said county, and he acknowledged that he executed the above deed for the uses and purposes therein mentioned.

L. F. PATTEN,
Notary Public.

(The plaintiff, however, not waiving any objection to said tax-deed, which may appear on its face, or which may be made to appear by any other facts or evidence in the case.)

That said deed was recorded in the office of the register of deeds, for Rock county, where said land is situated, on February 6th, 1852 (subject to the objection, however, which is reserved by the plaintiff on the ground that said deed is not so executed and acknowledged as to be entitled to be recorded); that immediately thereafter said Keep sold said premises to said defendant, and that said defendant immediately thereafter entered into possession of said premises, and has been in possession ever since.

That the plaintiff, on the 29th day of February, 1848, that being the proper time to pay the taxes on said land, including the tax for the nonpayment of which said tax deed purports to be given, wrote a letter and sent it by mail to the county treasurer of said Rock county, who was the officer authorized by law to demand and receive all the taxes on said land, including the delinquent tax in question, stating that he wished to pay the taxes on a list of lands mentioned, including the land in suit, asking for a bill of the same, showing the amount that he might remit; that said treasurer, on the same day, received said letter at his office, and answered it, including a bill corresponding with the receipt hereinafter given, stating that the inclosed was the bill called for by plaintiff's letter; that thereupon the said plaintiff remitted said amount to said treasurer, who received the same, and returned to said plaintiff the said receipt hereinafter set forth, the same day, and that at the date of the receipt the treasurer and the plaintiff supposed that all the taxes on said land were included in said receipt; but the parties agree that the particular tax for which the land was sold and deed given, was not found by said treasurer, and not included in said receipt.

That after the date of said payment and receipt, no demand was made of said plaintiff for payment of said delinquent tax, nor had said plaintiff actual notice that said tax remained unpaid until more than three years after the recording of the tax deed, but that the premises were duly advertised for sale, as by law required, and that said deed was recorded as hereinbefore set forth. That the said delinquent tax and costs amounted, at the date of the sale, to $19\frac{81}{100}$.

That on the 11th of April, 1857, said plaintiff deposited with clerk of supervisors of Rock county, the sum of $70\frac{50}{100}$, being the full amount of sale, interest, and costs, to redeem said land mentioned in the said tax deed, and that the deposit still remains there, there being no other unpaid tax on said land at that time.

The following is a copy of the receipt given by said treasurer, mentioned above, viz.:

Territory of Wisconsin, Rock County.

TREASURER'S OFFICE, February 29th, 1848.

Received of the different owners, per Catlin and Williamson, agents, twenty-five $\frac{60}{100}$ dollars, in full of the taxes charged for the year 1849, on the following tracts of land in the county of Rock, W. T., consisting of the following items of tax, to wit: county, town, common school, territorial revenue, and

Description.	Section.	Town.	Range.	Acres.	Value.	County.	Town.	Ter. Rev	Schools.	Roads.	Total.
E. ½ of S. W. ¼,	34	1	11	80	160	54	165	42			2 62
S. E. ¼, . . .	34	1	11	160	320	108	230	84			5 22
Lot No. 2, . .	11	4	12	32.56	$97\frac{32}{100}$	19	49	29			97
N.E. ¼ of N.E ¼,	3	4	11	40.44	170	34	32	20	29		1 15
Lot. No. 1, . .	11	4	12	55	$165\frac{36}{100}$	33	83	50			1 66
N. ½ of N. W. ¼,	1	4	10	40	233	86	88	43	70		2 87
S. W. ¼ of N. W. ¼,	1	4	10								
Lot No. 3, . .	15	4	12	64,35	$193\frac{14}{100}$	39	96	58	6.77		8 70
E. ½ of N. W. ¼,	14	4	11	80	112	69	68	43	62		2 42
											$25 60

WM. A. LAWRENCE,
Treasurer.

The first two tracts, being the land in question.

That the return of said land as delinquent, is as follows:

Peter Peterson, S. W. ½ of S. E. ¼, section 4, town 1, range 11, number of acres 80, valuation 160, town tax 165, county tax 54, territorial tax, 42, whole tax, 261 (and many other items of lands with taxes extended in the same manner).

To the Treasurer of the County of Rock, W. T.:

I hereby certify, that the above list of delinquent lands, and the taxes charged thereon, are taxes that were raised by a vote of a legal town meeting, assessed by assessors duly chosen and qualified, and were committed to the collector for collection, and returned according to law; and also that the following described delinquent land, and

the taxes charged on such lands, were raised by a legal school meeting, in district number seven, in the said town of Newark, for the purpose of building a school house in said district, and has been through the whole course of proceedings according to law, and have not yet been paid.

Said tax was levied November 2d, A.D. 1846.

S. E. ¼ of N. E. ¼, Sec. 35, T. 1, R. 11, . . .	$3 00
W. ½ of S. E. ¼, Sec. 34, " "	6 00
E. ½ of S. W. ¼, " " "	6 00
E. ½ of S. E. ¼, " " "	6 00
	$21 00

JOHN D. MARINER,
Town Clerk.

Wisconsin Territory, Rock County, *ss.*

You, Matthias Devor, collector of the town of Newark, in the county and territory aforesaid, do solemnly swear, that you have made diligent inquiries in your town, as the law requires, but have not been able to find goods and chattels liable to be taken for the payment of the taxes returned by you to this office, or any part thereof, sufficient to cancel the same, so help me God.

MATTHIAS DEVOR.

Subscribed and sworn to before me, this 18th day of January, A.D. 1848.

JOHN D. MARINER,
Town Clerk.

NEWARK, January 18th, 1848.

Wisconsin Territory, Rock County, *ss.*

You, Daniel Rodway, collector of school district number seven, in the town of Newark, county and territory aforesaid, do solemnly swear, that you have made diligent inquiry in your district, as the law requires, and have not been able to find goods and chattels liable to be taken for the payment of the taxes returned by you to this office, or any part thereof, sufficient to cancel the same, so help you God.

DANIEL RODWAY.

Subscribed and sworn before me, the 26th day of March, A.D. 1847.

JOHN D. D. MARINER,
Town Clerk.

This stipulation signed this 7th day of June, 1860.

ABBOTT & CLARK, and
WALDO, ODY & VAN,
For Plaintiffs.
MAT. H. CARPENTER,
For Defendants.

Verdict.

And the said jurors of the jury aforesaid, on their oaths, respectively do say, that the defendant is guilty of unlawfully withholding the east half of the southwest quarter, and the southeast quarter of section thirty-four, in township number one north, of range number eleven east, in the county of Rock and State of Wisconsin, in manner and form as the plaintiff hath herein declared against him; and the said plaintiff hath established a title in fee therein, and is entitled to recover possession of the same.

Judgment.

Whereupon it is considered and adjudged by the court now here, that the said plaintiff do have and recover possession of the premises so as aforesaid described, and that he have a writ of possession therefor; and that the said plaintiff do have and recover of the said defendant, John Leffingwell, fifty-two dollars and thirty cents, his costs about his suit in this behalf by him expended; and that he have execution herefor.

Judgment roll signed June 7th, 1860.
Costs $52 30.

J. M. MILLER,
Clerk.

Judgment roll filed June 7th, A.D. 1860, at 5 o'clock P.M.

J. M. MILLER,
Clerk.

And afterwards, to wit, on the twelfth day of June, A.D. 1860, bill of exceptions signed and filed as follows:

Bill of Exceptions.

District Court of the United States for the District of Wisconsin.

GEORGE B. WARREN
v.
JOHN LEFFINGWELL.

Be it remembered, that at a term of the District Court of the United States for the District of Wisconsin, began and held at the

court-room in the city of Milwaukee, in said district, on the second Monday, being the ninth day of April, in the year of our Lord one thousand eight hundred and sixty, the Hon. Andrew G. Miller, judge of said court, presiding, on the twenty-third day of said term, to wit, on the seventh day of June, in the year of our Lord one thousand eight hundred and sixty, the aforesaid issue, so joined between the said parties as aforesaid, came on to be tried by a jury of said district, for that purpose duly impanelled, good and lawful men of said district. At which day came there as well the said plaintiff as the said defendant, by their respective attorneys aforesaid; and the jurors of the jury aforesaid impanelled to try the said issue, being called, also came, and were then and there in due manner chosen and sworn to try the same issue.

And the said parties, by their respective attorneys, did make and enter into and read in evidence to the jury a stipulation in writing, in the words and figures as follows, to wit:

District Court of the United States for the District of Wisconsin.

GEORGE B. WARREN
v.
JOHN LEFFINGWELL.

To save expense of proof, the parties to this suit agree upon and stipulate to certain facts, to be admitted as proven and established on the trial of said cause, viz.:

1. That the plaintiff has a perfect chain of title to the land in question from the United States to himself; and that the defendant was in possession thereof at the time of the commencement of this suit; and that the land in suit is of the value of more than two thousand dollars.

2. That the county of Rock, on the 6th day of February, A.D. 1852, made and delivered to John M. Keep a paper purporting to be a tax deed of said premises, of which, and the certificate of acknowledgment, the following is a copy, viz.:

"State of Wisconsin, Rock County.

"To all to whom these presents shall come, greeting:

"Whereas, the treasurer of the county of Rock, in the then territory of Wisconsin, did, on the eleventh day of April, in the year of our Lord one thousand eight hundred and forty-eight, in pursuance of law, sell to Wm. A. Lawrence, treasurer of Rock County, the east half of the northwest quarter and the west half of the northeast quarter of section twenty-two, town one, range twelve, containing one

hundred and sixty acres; also the west half of the southwest quarter of section eight, town one, range twelve, containing eighty acres; also the southeast quarter of section twenty-eight, town one, range twelve, containing one hundred and sixty acres; also the northwest quarter of the southwest quarter of section twenty-nine, town one, range eleven, containing forty acres; also the southwest quarter of the southeast quarter of section twenty-one, town one, range eleven, containing forty acres; also the west half of the southeast quarter of section thirty-four, town one, range eleven, containing eighty acres; also the east half of the southwest quarter of section thirty-four, town one, range eleven, containing eighty acres; also the east half of the southeast quarter of section thirty-four, town one, range eleven, containing eighty acres. Also the following lots in the village of Beloit, to wit: Lot one, in block fifty-two; lot three, in block nineteen; lot twelve, in block four; lot three, in block forty-seven; for the sum of forty-one dollars and sixty-six and one-half cents, that being the amount of tax and charges due said county on the same for the year 1847; and did issue certificates of the sale thereof to said purchaser. And whereas, the time allowed by law for the redemption of said premises expired on the eleventh day of April, one thousand eight hundred and fifty-one.

"And whereas, said premises have not been redeemed within the time limited therefor by law, and in consequence thereof, the said purchaser or his assigns has become entitled to a deed for the same, from the proper office. And whereas, it appears that John M. Keep is the lawful owner of said certificates.

"Now, therefore, know all men by these presents, that the county of Rock, in consideration of the premises, and of the sum of forty-one 66½-100 dollars, and in conformity with the laws of the State of Wisconsin, in such case made and provided, has granted, bargained, sold, and conveyed, and by these presents does grant, bargain, sell, and convey unto the said John M. Keep, his heirs and assigns, forever, all the above-mentioned and described premises. Together with all and singular the privileges and appurtenances thereunto belonging. To have and to hold the same with the privileges and appurtenances to the said John M. Keep, his heirs and assigns, forever.

"In testimony whereof, I, Chancy P. King, clerk of the board of supervisors of said county, have, in pursuance of law, hereunto set my hand and affixed my seal, at Janesville, in the county and State aforesaid, this sixth day of February, in the year of our Lord one thousand eight hundred and fifty-two.

[SEAL.] CHANCY P. KING,
Clerk of the Board of Supervisors.

In presence of
L. F. PATTEN,
J. W. HOBSEN.

"State of Wisconsin, Rock County, *ss.*

"On this sixth day of February, A.D. 1852, came before me the above-named Chancy P. King, clerk of the board of Supervisors of said county, and he acknowledged that he executed the above deed for the uses and purposes therein mentioned.

L. F. PATTEN,
Notary Public.

(The plaintiff, however, not waiving any objection to said tax deed, which may appear on its face, or which may be made to appear by any other facts or evidence in the case.)

That said deed was recorded in the office of the register of deeds for Rock county, where said land is situated, on February 6th, 1852 (subject to the objection, however, which is reserved by the plaintiff on the ground that said deed is not so executed and acknowledged as to be entitled to be recorded); that immediately thereafter said Keep sold said premises to said defendant, and that said defendant immediately thereafter entered into possession of said premises, and has been in possession ever since.

That the plaintiff, on the 29th day of February, 1848, that being the proper time to pay the taxes on said land, including the tax, for the non-payment of which, said tax deed purports to be given, wrote a letter and sent it by mail to the county treasurer of said Rock county, who was the officer authorized by law to demand and receive all the taxes on said land, including the delinquent tax in question, stating that he wished to pay the taxes on a list of lands mentioned, including the land in suit, asking for a bill of the same, showing the amount that he might remit; that said treasurer on the same day received said letter at his office, and answered it inclosing a bill corresponding with the receipt hereinafter given, stating that the inclosed was the bill called for by plaintiff's letter; that thereupon the said plaintiff remitted said amount to said treasurer who received the same, and returned to said plaintiff the said receipt hereinafter set forth the same day, and that, at the date of the receipt, the treasurer and the plaintiff supposed that all the taxes on said lands were included in said receipt: but the parties agree that the particular tax for which the land was sold and deed given, was not found by said treasurer, and not included in said receipt.

That after the date of said payment and receipt, no demand was made of said plaintiff for payment of said delinquent tax, nor had plaintiff actual notice that said tax remained unpaid until more than three years after the recording of the tax deed, but that the premises were duly advertised for sale as by law required, and that said deed was recorded as hereinbefore set forth. That the said delinquent tax and costs amounted at the date of the sale to $\$19\frac{81}{100}$. That on the

11th of April, 1857, said plaintiff deposited with clerk of supervisors of Rock County the sum of $70\frac{50}{100}$, being the full amount of sale, interests, and costs, to redeem said land mentioned in the said tax deed, and that the deposit still remains there, there being no other unpaid tax on said land at that time.

The following is a copy of the receipt given by said treasurer, mentioned above, viz.:

"Territory of Wisconsin, Rock County.

TREASURER'S OFFICE,
February 29th, 1848.

"Received of the different owners, per Catlin & Williamson, agents, twenty-five $\frac{60}{100}$ dollars, in full of the taxes charged for the year 1847, on the following tracts of land in the County of Rock, W. T., consisting of the following items of tax, to wit, county, town, common school, territorial revenue, and

Description.	Section.	Town.	Range.	Acres.	Value.	County.	Town.	Ter. Rev.	Schools.	Roads.	Total.
E. ½ of S. W. ¼,	34	1	11	80	160	54	165	42			$2 62
S. E. ¼, . . .	34	1	11	160	320	108	230	84			5 22
Lot, No. 2, . .	11	4	12	32.56	$97\frac{32}{100}$	19	49	29			97
N.E. ¼ of N.E. ¼,	3	4	11	40.44	170	34	32	20	29		1 15
Lot, No. 1, . .	11	4	12	55	$165\frac{56}{100}$	33	83	50			1 66
N. ½ of N. W. ¼,	1	4	10								
S.W. ¼ of N.W. ¼,	1	4	10	40	233	86	88	43	70		2 87
Lot, No. 3, . .	15	4	12	64.35	$193\frac{14}{100}$	39	96	58	677		8 70
E. ½ of N.W. ¼,	14	4	11	80	112	69	68	43	62		2 42
											$25 60

WM. A. LAWRENCE,
Treasurer.

The first two tracts being the land in question. That the return of said land as delinquent, is as follows:

Peter Peterson, S. W. ¼ of S. E. ¼, section 4, town 1, range 11, No. acres, 80; valuation, 160; town tax, $1 65; county tax, 54; territory tax, 42; whole tax, $2 61.

(And many other items of lands with taxes extended in same manner.)

"To the Treasurer of the County of Rock, W. T.:

"I hereby certify that the above list of delinquent lands, and the taxes charged thereon, are taxes that were raised by a vote of a legal town meeting assessed by assessors duly chosen and qualified, and were committed to the collector for collection and returned according to law. And also, that the following described delinquent land, and the taxes charged such lands, were raised by a legal school meeting

in district number seven, in the said town of Newark, for the purpose of building a school-house in said district, and has been through the whole course of proceedings according to law, and have not yet been paid.

Said tax was levied November 2d, A.D. 1846.

S. E. ¼ of N. E. ¼,	section	35,	T.	1,	R.	11, . . $3 00
W. ½ of S. E. ¼,	"	34,	"	"	.	. 6 00
E. ½ of S. W. ¼,	"	"	"	"	.	. 6 00
E. ½ of S. E. ¼,	"	"	"	"	.	. 6 00
						$21 00

JOHN D. MARINER,
Town Clerk.

Wisconsin Territory, Rock County, *ss.*

You, Matthias Devor, collector of the town of Newark, in the county and territory aforesaid, do solemnly swear, that you have made diligent inquiries in your town as the law requires, but have not been able to find goods and chattels liable to be taken for the payment of the taxes returned by you to this office, or any part thereof, sufficient to cancel the same. So help me God.

MATTHIAS DEVOR.

NEWARK, January 18, 1848.

Subscribed and sworn to before me, this 18th day of January, A.D. 1848.

JOHN D. MARINER,
Town Clerk.

Wisconsin Territory, Rock County, *ss.*

You, Daniel Rodway, collector of school district number seven, in the town of Newark, county and territory aforesaid, do solemnly swear that you have made diligent inquiry in your district, as the law requires, and have not been able to find goods and chattels liable to be taken for the payment of taxes returned by you to this office, or any part thereof, sufficient to cancel the same. So help me God.

DANIEL RODWAY.

Subscribed and sworn before me, the 26th day of March, A.D. 1847.

JOHN D. D. MARINER,
Town Clerk.

This stipulation signed this 7th day of June, 1860.

ABBOT & CLARK, and
WALDO, ODY & VAN,
Per Plaintiffs.
MAT. H. CARPENTER,
For Defendant.

That said stipulation was all the evidence and proofs given on the trial of said issue by either party.

Whereupon the counsel for the said defendant did request the said judge to charge the jury, as follows:

1. That it being admitted by the parties that the defendant entered into possession of the land in question under a tax-deed, and has held said possession under said deed more than three years before the commencement of this action, and it being also admitted that said tax for which said land was sold was never paid, they will find for the defendant.

And the said judge refused to give said instruction, and to which refusal the said defendant, by his said counsel, did then and there, and in the presence of the said jury, duly except.

2. That by law the tax could only be extinguished by payment, and that a willingness on the part of the plaintiff to pay is not equivalent to payment.

And the said judge refused to give said instruction, and to which refusal the said defendant, by his said counsel, did then and there, and in the presence of the said jury, duly except.

3. That if the plaintiff chose to make the treasurer his agent to ascertain the amount of taxes, that he is bound by his act or mistake, like that of any other agent.

And the said judge refused to give said instruction, and to which refusal the said defendant, by his said counsel, did then and there, and in the presence of the said jury, duly except.

4. That there is but one way to redeem land returned for unpaid taxes, and that is by payment to the treasurer; and if this is not done, the land is not redeemed; and it is immaterial that the plaintiff would have redeemed it, if he had known of it. That the publication of the sale of this land for this tax, after the payment mentioned in the stipulation, was notice to the plaintiff that this tax remained unpaid; and it was his duty to have paid the tax, notwithstanding it had been overlooked, when said receipt was given.

And the said judge refused to give said instruction, and to which refusal the said defendant, by his said counsel, did then and there, and in the presence of the said jury, duly except.

5. That it is no part of the legal duty of the county treasurer to correspond with proprietors of land about taxes upon land; and that if a land-owner, instead of searching himself for taxes against his

land and paying them, relies upon the letters of the treasurer, he must suffer for his mistakes, like those of any other agent.

And the said judge refused to give said instruction, and to which refusal the said defendant, by his said counsel, did then and there, and in the presence of the said jury, duly except.

And the said judge did also then and there further declare and deliver his opinion to the said jury, that the deed is void on its face, as it recites that the several tracts therein described were sold collectively for a gross sum; and the deed being void, neither it, nor the subsequent possession by the defendant under it for three years after the recovery thereof, is a bar to the plaintiff's recovery.

To which said last-mentioned opinion and charge of the said judge the said counsel for the said defendant did then and there, and in the presence of the said jury, on behalf of the said defendant, duly except.

And the said judge did also then and there further declare and deliver his opinion to the said jury, that the receipt of the treasurer of the county to Catlin & Williamson, *agents*, is conclusive, and is to be considered the same as a payment of the particular tax for which the sale was made, and the county authorities could not afterwards sell the land to itself or any person for payment of the same.

To which said last-mentioned opinion and charge of the said judge the said counsel for the said defendant did then and there, and in the presence of the said jury, on behalf of the said defendant, duly except.

And the said judge, under the charge and with the directions aforesaid, left the aforesaid issue, and the evidence so given on the trial thereof as aforesaid, to the said jury, and the jury aforesaid then and there gave their verdict for the said plaintiff.

And inasmuch as the said several matters so produced and given in evidence on the part of the said defendant, and by his counsel aforesaid, objected and insisted on as a bar to the action aforesaid, do not appear by the record of the verdict aforesaid, the said counsel for the said defendant did then and there propose their aforesaid exceptions to the opinion, charge, and instructions of the said court, and requested said district judge to put his seal to the bill of exceptions containing the said several matters so produced and given in evidence on the part of the said defendant as aforesaid, according to the form of the statute in such case made and provided, and to the rules and practice of the said District Court; and thereupon the said district judge, at the request of the said counsel for the said defendant, did put his seal to this bill of exceptions, pursuant to the aforesaid statute, rules, and practice, on the 12th day of June, one thousand eight hundred and sixty.

A. G. MILLER. [SEAL.]

June 15, 1860.

This day came the defendant, and filed a bond in the penalty of one thousand dollars, with Portius Moore and William Leffingwell as sureties, conditioned that he will prosecute a writ of error to effect, and answer all damages and costs, if he shall fail to make good his plea,—and the said bond is approved by the judge,—which said bond is as follows:

Bond.

Know all men by these presents, that I, John Leffingwell, of Rock county, Wisconsin, as principal, and Portius Moore and William Leffingwell, of said county, as sureties, are held and firmly bound unto George B. Warren in the penal sum of one thousand dollars, lawful money of the United States, to be paid to the said George B. Warren, his heirs, executors, administrators, or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this eleventh day of June, A.D. 1860.

Whereas lately, at a term of the District Court of the United States for the District of Wisconsin, in a suit depending in said court between George B. Warren, plaintiff, and the above bounden John Leffingwell, defendant, in an action of ejectment, a judgment was rendered against the said John Leffingwell; and the said John Leffingwell having obtained a writ of error to remove the said cause to the Supreme Court of the United States to reverse said judgment.

Now, therefore, the condition of the above obligation is such, that if the said John Leffingwell shall prosecute his said writ of error to effect, and answer all damages and costs, if he fail to make his plea good, and if said judgment shall be affirmed by the said Supreme Court, and the said Leffingwell shall well and truly pay all damages and costs that shall be awarded against him in said writ, then the above obligation to be void; otherwise to remain in full force and virtue.

JOHN LEFFINGWELL. [SEAL.]
PORTIUS MOORE. [SEAL.]
WM. LEFFINGWELL. [SEAL.]

Signed, sealed, and delivered
in presence of
J. C. CONVERSE,
W. C. SPALDING.

District of Wisconsin, *ss.*

I, Ward C. Spalding, commissioner of the District Court of the United States for the District of Wisconsin, do hereby certify that the within-named obligors are known to me to be perfectly good and responsible for the within-named amount.

W. C. SPALDING,
Commissioner.

And the said bond is approved by the judge as follows:

June 15, 1860.

This bond and sureties approved, and it is ordered that execution be and hereby is superseded.

A. G. MILLER,
Judge.

And it is ordered that execution be superseded, and that a writ of error and citation be issued; and same day writ of error and citation issued, and copy of writ of error lodged for defendant in error.

United States of America, District of Wisconsin, *ss.*

I, John M. Miller, clerk of the District Court of the United States of America for the District of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals now on file and remaining of record in my office,—being a full and complete exemplification of the record and proceedings in the suit of George B. Warren against John Leffingwell.

In testimony whereof, I have hereunto set my hand, and duly affixed the seal of the said court, at the city of Milwaukee, in the said district of Wisconsin, this twenty-seventh day of September, in the year of our Lord one thousand eight hundred and sixty, and of the independence of the said United States the eighty-fifth.

[SEAL.]

J. M. MILLER,
Clerk.

United States of America, *ss.*

The President of the United States of America to the judge of the District Court of the United States of America for the District of Wisconsin, greeting:

[SEAL.]

Because, in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said District Court of the United States of America for the District of Wisconsin, before you, between George B. Warren, plaintiff, and John Leffingwell, defendant, a manifest error hath happened, to the great damage of the said John Leffingwell, as by the complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf. You are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the Supreme Court to be then and there held, that the record and pro-

ceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, that of right and according to law and custom of the United States should be done.

Witness the Honorable Roger B. Taney, chief justice of the said Supreme Court of the United States, this fifteenth day of June, in the year of our Lord one thousand eight hundred and sixty, and of the independence of the United States the eighty-fourth.

J. M. MILLER,
Clerk.

Indorsed: John Leffingwell, plaintiff in error, *v.* George B. Warren, defendant in error. Writ of error. Filed June 18, 1860.

The United States of America to George B. Warren, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Wisconsin, wherein John Leffingwell is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Roger B. Taney, chief justice of the said Supreme Court of the United States, this fifteenth day of June, in the year of our Lord one thousand eight hundred and sixty, and of our independence the eighty-fourth.

A. G. MILLER,
Judge of the District Court U. S.

Served on the above-named George B. Warren, by delivering a copy of this citation to Messrs. Waldo, Ody & Van, his attorneys, who accepted service of the same verbally, this 18th day of June, 1860.

J. H. LEWIS,
Marshal.
By F. HENRY,
Deputy.

Marshal's fees:

Service, . .	$2 00
Travel, . .	06
Copy, . . .	20
	$2 26

Indorsed: 143. Jan. term, 1858. John Leffingwell, plaintiff in error, *v.* George B. Warren, defendant in error. Citation. Filed June 21, 1860.

Supreme Court of the United States.

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GEORGE B. WARREN,

Defendant in Error,

ADS.

JOHN LEFFINGWELL,

Plaintiff in Error.

Brief and Argument of Defendant in Error.

I. R. Doolittle

Attorney for Defendant in Error.

SMITH & CULLATON, PRINTERS, ARGUS OFFICE, MADISON, WIS.

SUPREME COURT of the UNITED STATES.

GEORGE B. WARREN,
Defendant in Error.

ADS.

JOHN LEFFINGWELL,
Plaintiff in Error.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

As there is an understanding between the counsel of the plaintiff and the defendant that whatever argument each party may desire to make shall be submitted in print; agreeably to that understanding, I proceed to state, in as few words as practicable, the ground upon which the defendant in error relies to sustain the judgment of the District Court, to reverse which, this writ of error has been sued out.

Statement of Case.

It is admitted "that the defendant in error has a perfect chain of title to the land in question from the United States to himself."—[*Vid. p.* 8, *printed case.*]

To defeat this title, the plaintiff in error relies solely upon a tax deed, bearing date on the 6th day of Feb. 1852, issued on a sale made on the 11th day of April, A. D. 1848, for taxes assumed to have been due thereon for the year 1847, a copy of which deed is given on pp. 8 and 9 of the printed case, and possession under that deed for more than three years previous to the commencement of this suit.

To do away entirely with the effect of this deed, the defendant in error relies.

First. Upon the fact that he holds a receipt in full for the taxes upon the premises for said year 1847. The receipt found on p. 17, of the printed case, embraces the land in question.

The circumstances connected with the giving of this receipt are detailed in the stipulation given on p. 10, of the printed case. There it is distinctly stated and admitted that at the proper time for the payment of the taxes on said premises for

Tax paid.

the said year 1847, including the tax for which said land was afterwards sold, the plaintiff below (the defendant here) wrote to the Treasurer of the county where the premises are situated who was the only officer authorized by law to receive or collect said taxes, stating that he wished to pay the taxes on the list of lands given in said letter, among which was the land in question; asking for a bill of the same, showing the amount, that he might remit it to him. That the Treasurer on the same day made out a statement of the taxes due on said premises, and sent it to the said Warren, who forwarded the amount to the Treasurer. That the Treasurer, on the receipt of the amount, transmitted to the said Warren the receipt, a copy of which is found on p. 11 of the printed case, as aforesaid.

Rec'pt in full.

It was the intention of the Treasurer to state, and of the said Warren to pay, all the taxes charged against the land; but it seems that by an oversight of the Treasurer he omitted to include one item of tax upon the premises for that year, although Warren and the Treasurer fully supposed that the said Warren had paid all the taxes charged againt said premises for that year, in paying the amount stated as due thereon by the Treasurer as aforesaid.

It further appears that neither Warren or his agents knew of the existence of this omitted item of tax, nor of the sale of the premises therefor, until more than three years after the possession of said premises by the said Leffingwell under the tax deed issued on such sale, and a very short time before this suit was brought.

Want of knowledge of omitted tax.

On the basis of these facts, it is contended and claimed on the part of Warren, the defendant in error, that he has done all the law required him to do in reference to the tax upon his land for the year in question. In the first place he paid in good faith all the tax which the Treasurer of that county informed him was charged against the land, and received from the Treasurer a receipt in full of the taxes for that year, in the honest belief that in paying the amount specified by the Treasurer, he had paid all taxes of every kind charged against the land; so that no blame, or want of prudence or care, or of good faith, can be, in the slightest degree, chargeable to him.

Warren performed the whole duty.

Should he then be chargeable for the mistakes of the Treasurer? Certainly not. I understand that the plaintiff in error claims that the defendant in error is responsible, *only* on the ground assumed by him, that Warren made the Treasurer his agent, by writing to him for a statement of the amount of taxes

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due on a list of land, embracing the premises in question; recognizing the general rule that in all ordinary dealings with the officers, a mistake by them shall not prejudice the rights of the person in transacting whose business the mistake occurred.

Officer's mistake not to prejudice owner's rights.

In the first place it is not true that the defendant in error made the Treasurer his agent in any sense whatever. If Warren or his agents, Catlin and Williamson, had gone personally to the office of the Treasurer, for the purpose of ascertaining and paying the taxes charged against said premises, and had there paid in good faith to the Treasurer all the taxes which the Treasurer represented to them as being against said premises, and taken his receipt in full, in this case it is admitted, as I understand, (or if it is not, it must be, for there is no doubt on the question) that there would be no agency of the Treasurer on behalf of Warren; and if a mistake should have been made by the Treasurer as to the amount of the tax, that mistake could not prejudice the rights of Warren.

Officer not agent of Warren.

But is there any difference in the effect of the transaction, whether Warren makes this enquiry and payment in person, or by letter?

There is no difference. If Warren would not make the Treasurer his agent by going to his office and asking him personally relative to his taxes, neither would he come any nearer making him his agent by putting the same questions in writing, and sending them to him by mail. And this is all he did from which the agency is claimed to have been created.

Enquiry by letter did not make him agent.

In the next place I take the position that the County Treasurer, being the officer, and *only* officer of the county, entrusted with the collection of these taxes, could not act as agent of any individual in their payment. The law, having entrusted this business to him, as the agent of the government for that purpose, will not permit him to leave that trust or to act in the double capactity as agent of the government in receiving, and of the individual in paying taxes.

Treasurer could not act as agent of Warren.

The presumption is that all the acts of the Treasurer in and about the regular duties of his office, of which the receiving and collecting taxes is the most important—are official acts and done by virtue of his office, and if it is claimed in any instance that they are done in any other way, the testimony should be so clear as not to admit of a doubt. But in this case there is an entire want of evidence that there was any design, as in fact there was not, either on the part of Warren or the Treasurer, that Warren should deal with the Treasurer in any other way than simply in his official character as such Treasurer.

We must give then to what was done, all the effect which it would have without this attempt, on the part of the plaintiff in error to set up the relation of principal and agent between the defendant in error and the County Treasurer.

The defendant in error called upon the Treasurer for the purpose of paying all the taxes charged against his land. The Treasurer stated the amount, and the defendant in error paid it, and took a receipt therefor in full. The defendant in error, in doing this, did all that the law required him to do. He was under no obligation, even if he had had the right to overhaul the books and records in the Treasurer's office, to see whether the Treasurer had made a mistake, or wrongly stated the amount. If there were any evidence, or even any pretense of bad faith, and that the defendant in error knew, or had any reason to suppose that there had been a mistake, it might alter the case.— But there is no proof or pretense of this kind.

The defendant in error having thus done what the law required him to do, there was no longer any obligation resting on him to give any further attention to the matter — and the 4th instruction asked by the plaintiff in error on the trial in the District Court, is not warranted by law, equity or justice, "that the publication of the sale of this land for this tax, after payment mentioned in the stipulation, was notice to the plaintiff (below,) that this tax remained unpaid."

On the contrary, the defendant in error, after such payment, had a right to suppose, as the fact was, and as is admitted in the stipulation (p. 16 of printed case) that the matter of taxes on said premises for the year in question was settled, and the law would fully excuse him from any *constructive* notice to the contrary. What would have been his duty in case his attention had been *actually* called to the mistake prior to the sale, it is not material to discuss; for it is admitted that the defendant in error knew nothing of this supposed omission until more than three years after the sale, during all which time he fully supposed he had paid all the taxes charged against said premises. *Vid.* p. 16, *printed case, near the foot of the page.*

Publication not notice to Warren.

Besides, there is no proof of any publication of notice; but if there were, and even if Warren had seen the published notice of sale of lots and lands for the year in question, it could not have been any notice to him of any charges on his lands, for as the law then stood, the published list was not required to contain a *list of the* delinquent lands; the only list required was a written one, posted in the office of the County Clerk. *Vid.* sec. 19, hereafter quoted.

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I suppose the reason why this tax came to be omitted by the Treasurer was, that it was a special and extraordinary tax —as appears from the papers—and this fact excuses the defendant from all presumption that he could have had any reason for supposing there was any such tax, until his attention was actually called to it.

Is it not manifest, then, from all these considerations, that the effect of the payment of the taxes by the defendant in error, and of the receipt taken therefor, as found on p.p. 11 & 17 of the printed case, was and is the same, as fully to all intents and purposes, to relieve said land from liability to sale, as though that receipt had embraced the particular item of tax not actually paid.

No proof of omitted tax.

There is, however, another thing which should not be lost sight of, viz., that there is no proof of the legality, validity or regularity of this pretended special, omitted tax.

It is admitted (*see stipulation near close of p.* 10, *printed case*) "that the particular tax for which the land was sold and deed given, was not found by said Treasurer, and not included in said receipt;" and "that the said delinquent tax and costs amounted at the date of the sale, to $19 81." *But this admission did not relieve the plaintiff in error from the necessity of proving the regularity of the tax, and of the sale upon it.*

As Warren holds a *receipt in full*—to say the least that can be said; and if every thing else were out of the way—before the effect of that receipt can be disturbed, in consequence of any pretended or alleged mistake, it must be made to appear that there *was* a mistake, in not including an item of tax which should have been inserted; and in doing this, the very first thing to be done, is, to show the *legality* of the tax which it is said was omitted. Because, if this item had not been properly levied, it was properly omitted, and the affirmative of this proof is on the party claiming under the mistake.

Moore versus Brown, 11 Howard, 414. 11 Ill. R. 402.

In the next place, the tax deed, upon which the plaintiff in error relies for title to the premises, is *void upon its face*, and therefore affords neither a basis of title in itself, nor *color* of title upon which the statute of limitations could operate as a bar to a suit by Warren, the real owner, for the recovery of the land.

24th Maine, 318.

The law under which the sale was made, as well as the very necessity of the case, both require that the several lots and parcels of land upon which the taxes had not been paid, should be *separately* sold. This was necessary to enable the owner of any particular tract to avail himself of the privilege of redemption,

which the law gave him within two years from the time of sale.

The following is a copy of such of the laws of the then Territory of Wisconsin, as are applicable to the question. *Session Laws of A. D.* 1841, *p.* 40, *et seq.*

"SECTION 10.—* * * * the Town Clerk shall, before the first day of January, of every year, make out and forward to the County Treasurer, a certificate, under his hand, describing the delinquent lands and town lots, and the taxes thereon, certifying that such taxes were raised by a vote of a legal town meeting, assessed by assessors duly chosen and qualified, and were committed to the Collector for collection, and returned according to law; and the Town Clerk shall also forward along with such certificate, an attested copy of the Collector's affidavit as aforesaid."

Copy of laws.

"SECTION 19.—After the Clerks shall have forwarded the returns of unpaid taxes, and other papers, as required by the 10th section of this chapter, the County Treasurer shall give notice in some newspaper published in his County, if there be one so published; if not, then in some newspaper published at the seat of government: also by posting up three written notices at the most public places in such county, for at least four weeks preceding the second Tuesday in April, annually, notifying all whom it may concern that he will, on the second Tuesday next ensuing such notice, commence selling at some one of the most public places in the County, (describing the same) all and singular the lands and town lots in such County on which the taxes due for the year or years, (namely the year or years for which he is anthorized to collect) shall not have been paid prior to the sale, and that such sale will be continued from day to day, between the hours of nine o'clock in the forenoon, and four o'clock in the afternoon of each day, until all shall be offered for sale, and it is hereby made the duty of the County Treasurer to describe in one of his written notices, which one shall be posted up at the office of the Clerk of the Board of County Supervisors, each tract of land or town lot intended to be sold as aforesaid."

"SECTION 20.—In pursuance of such notice, the County Treasurer shall proceed on the said second Tuesday of April to expose to sale each and every tract of land and town lot on which the taxes are not paid by the description and number by which they are designated on the duplicate for the taxes and costs of advertising and selling the same: or he may expose to sale so much of said tract of land or lots as will sell for the

amount due and chargeable thereon. Such Treasurer shall declare at the time of sale, in what manner the division of a lot or tract of land shall be made, if a part thereof will pay the tax and other charges, and he shall continue from day to day, between the said hours, to expose the said lot and lands to call to the highest bidder, until all shall be duly offered."

SECTION 21.—When any lots or tracts of land or parts thereof, shall be sold for the non-payment of the taxes and costs, and charges thereon, the County Treasurer shall give to the purchasers a certificate in writing, describing the same with specific certainty, the sum paid therefor, and the time when the purchaser will be entitled to a deed for such lot or tract, or part thereof; which certificate shall be assignable and transferable by endorsement upon the same, and such assignments shall have the same force and effect as the assignment of the bonds for the conveyance of lands; and if the owner or claimant of the lot or tract of land described in such certificate shall not, within two years from the date thereof, pay to the purchaser, his heirs or assigns, or to the Clerk of the Board of Supervisors of the county in which said tract of land or lot was situated, for the use of such purchaser, his heirs or assigns, the sums mentioned in such certificate, with interest thereon, at the rate of thirty per centum per annum, together with such other taxes, costs and charges upon the lot or tract of land as may have accrued under the laws of this Territory, or been paid by such purchaser, his heirs or assigns, voucher of such payment being deposited with such clerk, or produced to such owner or claimant, then the said Clerk of the Board of Supervisors, or his successor in office at the time such deed is demanded, shall, at the expiration of said two years, execute to said purchaser, his heirs or assigns, in the name of the Territory of Wisconsin, a conveyance of the lot or tract of land so sold as aforesaid, and described in said certificate, which conveyance shall vest in the person to whom it is given an absolute estate, in fee simple, subject to the claims of the town for all taxes, costs and charges, if any accrued, and remaining unpaid upon such lot or tract of land after such sale as aforesaid. And such conveyance shall be *prima facie* evidence that such sale was regular, according to the provisions of this act, and every such conveyance executed by the Clerk of the Board of Supervisors, and duly acknowledged before any officer authorized to take acknowledments of deeds, may be recorded, and have like force and effect as other conveyances when acknowledged and recorded."

The above provisions all look to a *separate* assessment, advertisement and sale of taxable real estate.

Lands sold for gross sum.

By the recital in the Tax Deed, as contained on p.p. 9 and 10 of the printed case, it appears that nine tracts of land described by government line, and four village lots in Beloit were sold *in solido* for the sum of forty-one dollars and sixty six and one-half cents.

Woodburn *vs.* Wiseman, 3 Casey, 18.

Now it may be claimed that these lots were sold separately. I answer that I know nothing about it, and the Court can know nothing about it, except what appears from the deed, and we must take the deed as it is, and not as it might have been, or as it ought to have been.

Sale illegal and void.

As this method of sale was in plain violation of law, the District Court did not err in deciding that the deed, for this reason, was void on its face.

See *Hayden* vs. *Foster*, 13 Pick., R. 496.

Baskins v. Winstow, 24 Miss., R. 431.

Again, by the terms of the act quoted above, the deed should have been made in the name of the Territory (or State) of Wisconsin. See Sec. 21 of act above quoted. The State of Wisconsin, and not the County of Rock, should have been the grantor to make the Deed of any effect, that is, if the law, as it stood at the time of the sale, is to govern the subsequent proceedings.

At the time of the execution of the Tax Deed, the provisions of the act above quoted had been changed, and the Revised Statutes of 1849 had been adopted, providing as follows:

"SECTION 109.—If any land sold for taxes shall not be redeemed as aforesaid, the Clerk of the Board of Supervisors of the County where the same was sold, shall, after the expiration of the time prescribed by law for the redemption thereof, on the presentation to him of the certificate of sale, execute in the name of his County, as Clerk of the Board of Supervisors thereof, under his hand and seal, to the purchaser, his heirs or assigns, a Deed of the land so remaining unredeemed," &c.

If this law should be held as regulating the manner of executing the Deed on sales made prior to its passage, still the Deed is void. The act provides *that the Clerk of the Board of Supervisors, &c., shall execute in the name of his County as Clerk, &c.* In executing this deed, Chancy P. King, who signs his name to it, does not assume to act *as* Clerk of the Board of Supervisors of Rock County. It is true that he affixes that title to his name, but it is a mere *descriptio personae*, and does not give a fiduciary or official character to the act.

Blackwell, in his treatise on the subject of taxes and tax titles, p. 450, says: "A tax deed, which upon its face bears evidence of a non-compliance with a substantial requisition of law, is a nullity," and quotes to sustain this opinion, *Moore* v. *Brown*, 4 McLean R. 211—11 Howard, U. S. R. 413—*Farrar* v. *Eastman*, 1 Fairf. R. 191—*Hogans* v. *Brashears*, 8 Eng. R., p. 242.

These, and innumerable other authorities, which might be quoted, all show that the Deed in question is *void* upon its face, and furnishes, therefore, no basis upon which the statute of limitation can run, as claimed by the plaintiff in error. And if it is not good for that purpose, of course it is of no account as the basis of a title to cut off the righrful owner of the fee.

As regards the instructions to the jury, which were asked and refused on the trial of this cause in the court below, the first two assume that nothing short of *actual payment* of the tax could relieve the land from its legal liability to sale for such tax. This assumption is not true. An offer to pay, or a tender of the amount, would be equivalent to actual payment, as well as the receipt in full which we hold. Again, it implies that the plaintiff below could not recover his land if there was an unpaid item of tax against it, however illegal he could show the tax to be, or however defective and void might be the Deed executed upon the sale of the land for such tax. And the first instruction further assumes that the statute of limitation may be effective on any kind of a Tax Deed, however void on its face, or however open to objection it may be. I also refer the Court to Blackwell's Tax Titles, p. 205, ch. 8, on the subject of a *demand of a tax*, and the cases there cited. It is there said that "It would be an alarming doctrine, to say that a collector of taxes might sue immediately every person upon the assessment roll, without first demanding payment of the taxes. It would be equally alarming to permit a collector to seize and imprison the body or distrain and sell the personal estate of a citizen against whom a tax has been assessed, without notifying him that the tax is due, and demanding the payment. A condemnation without a hearing, or an opportunity of one, would be contrary to natural justice; and it ought not to be presumed that the legislature intended that the summary power of collecting taxes by imprisonment of the body, or sale of the goods or land of the person assessed, should be arbitrarily exercised by the officer charged with the collection." And on page 484 of the same work it is said "The authority of the government only extends to

No demand of tax. Blackwell, p. 205.

those cases where the owner *neglects* to pay the tax in arrear *voluntarily*." (The italics are in the original.) And a little further, on the same page, "When the owner has performed all of his duty to the government, no court would sanction, under any circumstances, the forfeiture of his right of property."

Can it with any truth or reason be said that the defendent in error did not perform all his duties to the government when, instead of waiting for a demand, he sought out the collecting officer, and paid him all the taxes represented to be due, and all that he had any reason to suppose was due on his lands? And as soon as he knew of the claim of this omitted tax, he deposited with the proper officer the money to meet the same, should it turn out to be a proper charge. (See top of p. 11, printed case.)

The third instruction asked and denied, is answered in what I have already said on the subject of the pretended agency.

Review of instructions refused, &c.

As to the fourth instruction, which was asked for by the plaintiff in error, it is equally clear that it embraces propositions which could not legally have been given to the jury.

The first paragraph is answered by the answer to the second —that although the ordinary way of redeeming land from unpaid taxes is to pay them, yet this is not absolutely and without qualification the only way in which it can be done. There are other things which are equivalent to a payment; a tender and refusal, adjudication of court, discharge by competent authority, &c.

The next clause, "That it is immaterial that the plaintiff (below) would have redeemed it if he had known it," is utterly inconsistent with the authorities which I have quoted above, on the subject of demand, willingness to pay, &c. As to that part which relates to constructive notice by publication, I have already answered it. How could the defendant in error have paid a tax which neither he nor the collecting officer knew to exist?

And how could a publication, which was only intended for those who had not paid their taxes, be notice to him, when he held a receipt in full, and had not the least suspicion or intimation that it did not embrace all of his tax, especially when that published notice was a general notice, without specifying names or lands. The kind of notice will be found in Sec. 19, before quoted. It is "notifying all whom it may concern that he (the Treasurer) will on, &c., at, &c., sell, &c." Again I ask, how could Warren know that this sale concerned him, when he had (as he supposed, and as the very officer who was to make the sale had informed him,) paid *all* the taxes charged against him.

As to the first part of the fifth instruction, which was asked

and denied, it is of very little consequence whether it was or is the strict *legal duty* of the County Treasurer to answer letters of enquiry relative to taxes or other matters pertaining to his office. But if he should be courteous enough to do so, without putting the correspondent to the trouble and expense of coming to put the questions in person, I have no fear that this or any other court will hold it as the creation of the relation of principal and agent between them; or that the information given by way of letter is any less official than that given by word of mouth.

Instructions given.

As to that part of the instruction given by the District Judge relative to the invalidity of the Tax Deed, I have already said all it can be necessary to say.

As to the second point, relative to the effect of the receipt which was given by the Treasurer to the defendant in error, I think there can be no reasonable doubt of the correctness of the charge of the Hon. Judge in that particular.

The County Treasurer was the agent of the county for the collection of taxes, and the only one through whom tax payers could act and get a discharge from their taxes. The defendant in error did pay him all the tax demanded and take his receipt in full as such officer. Would any court lend the sanction of its authority to such a monstrous wrong as would be committed, if, after the Treasurer had done this, he should be allowed to sell—and to the very authority for which he was acting—the same lands which he had already discharged in full from the taxes of that year. The proof, as stipulated in the case, shows that the defendant in error paid all the taxes that were demanded of him and all that were supposed to be due upon the land in question, after applying to the Treasurer for this very purpose—that he received a rece pt in full, and went his way in the full confidence that he had done his whole duty, discharged his whole obligation; and, although the proof does not show it, yet it is a fact that he continued to pay the taxes upon these same lands, year after year, and that it was only by accident that he found, after several years, that these lands had been, by the very officer whose receipt in full for the taxes of that year he held, sold to himself as such officer—a deed executed and the land in the actual occupation of the plaintiff in error, claiming that by virtue of that deed the defendant in error had lost all his right to land which he had indulged himself in the belief that he owned, free from the grasp, even of the tax gatherer: never having dreamed how easy a thing it was for the government to relieve him of

what he possessed, even after he had in honesty and good faith discharged all his obligations relative thereto, to that government.

If such proceedings could stand the scrutiny of courts, it would, in the language of the Court, cited above in the case of Thompson *vs* Gardner, (10 Johns. R., 404,) "Be an alarming doctrine."

In a recent case, decided in the Supreme Court of Pennsylvania, as quoted in Blackwell on Tax Titles, p. 488, *Laird* vs. *Heister*, LOWRIE, J., in delivering the opinion of the court says—

"When the owner of an unseated tract of land, goes to the Treasurer and offers to pay to him all the taxes upon it, and does pay the amount demanded, and the Treasurer credits the payment to another tract, and sells this, it is a good payment, and the sale is void. If a man has really, and in good faith performed his duty *to the satisfaction of the proper officers*, HIS LAND IS SAFE. If it be sold after that, it is through the error of some officer, which cannot be visited on the owner, for the State does not mean that the owners of unseated lands shall warrant the fidelity or competency of its officers."

J. M. Doolittle
Atty. of Deft. in error